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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 369

EPHRAIM FREIGHTWAYS, INC., Petitioner,

v.

RED BALL MOTOR FREIGHT, INC., Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER

Petitioner submits the within brief in reply to matters raised by respondent in its brief in opposition.

ARGUMENT

Plaintiff states at the outset of its argument in its brief in opposition: "There is nothing about the present case to occasion review by this Court on certiorari." To the contrary, this defendant has shown that the matter before this Court is worthy of consideration of this Court for review.

Plaintiff has dismissed the final portions of the petition which demonstrate the importance of this entire matter on appeal as "little more than flights of fancy contrived to support the unsupportable proposition" of defendant. The importance of this entire matter — to defendant, since if plaintiff prevails, it would virtually force defendant out of business; to 90% of the contract carriage in Colorado, since it conducts its operations in substantially the same manner as defendant; and to the people of the State of Colorado, shippers and consumers alike — in our view has been adequately set forth in the petition on pages 8-10. Further, defendant has shown that this is a matter of importance to all others seeking appeals who will be indirectly affected by the order of the Court of Appeals which denied review of the order denying defendant's motion to stay proceedings in the district court.

Defendant in its petition relies upon *Shanferoke Coal & Supply Corporation v. Westchester Service Corporation,* 293 U. S. 449 (1934) to support its position that the order is appealable. Plaintiff has spent several pages explaining the meaning of *Shanferoke.* With plaintiff's conclusion regarding *Shanferoke* we wholeheartedly agree. *Shanferoke* permits an appeal where a court has "refused to restrain proceedings in a pending action [at] law, or, in the words used by the Court in *Enelow,* when the trial court 'in effect grants or refuses an injunction restraining proceedings at law precisely as if the court had acted upon a bill of complaint in a separate suit for the same purpose' (293 U. S. at 383)." Respondent brief p. 7. This is precisely what the District Court did in the within matter. It refused to restrain proceedings in the pending action at law when it refused to grant the stay requested by this defendant. Defendant therefore did not miss or disregard the basis of the holding in *Shanferoke,* nor patently distort the meaning of that case nor grossly misinterpret nor misapply the holding of those cases as plaintiff has charged on p. 7 of its brief.

There is no question about the fact that the district court below refused to stay the within action. The only question is, did the court refuse to restrain proceedings in a pending action *at law*. The first point of disagreement between plaintiff and defendant here is simply as to whether the pending action is an action at law or a suit in equity. To determine that matter requires only an examination of the complaint. This was done on page 6 of the petition wherein defendant demonstrated that the matter is an action at law. Plaintiff cannot change its action simply by announcing to this Court that it is otherwise. It is at least an action at law — and defendant submits that it is predominately an action at law — coupled with an action in equity, and therefore is appealable under the *Shanferoke* case. This principle has already been announced by this Court.

However, a principle which has never been announced by this Court is the principle which plaintiff seeks to apply in its argument on page 10 and thereafter. Its contention is that a stay order if it is to be appealable must be for the purpose of permitting a prior determination of a related *equitable* matter. Plaintiff cites and quotes from *Baltimore Contractors, Inc. v. Bodinger*, 348 U. S. 176 (1955) in support of this proposition. However the *Bodinger* case does not support plaintiff's proposition. This proposition has been set forth only in cases before various courts of appeal. Until now this doctrine had never been announced by the court below for the tenth circuit. The doctrine appears clearly in conflict with 28 U.S.C., section 1292 (a) (1) which says nothing to the effect that appealability requires that the purpose of the stay must be for the prior determination of a related equitable matter.

The stay sought by defendant herein was for the purpose of permitting the prior determination of a related matter pending before the Public Utilities Commission of the State of Colorado. Defendant has shown in its petition that the basic issues before the Commission are also the

basic issues in the within matter. The determination by the state tribunals will be controlling upon the federal courts. Therefore, defendant submits, that the matter before the Commission is a directly related matter, whether it is an equitable matter or not. This purpose, along with the other requirements of appealability which are here present, should be sufficient reason to permit an appeal, if any "purpose" at all is necessary under the statute. Defendant has petitioned this Court to determine the question which, it is believed, has never been determined by this Court, namely, whether under 28 U.S.C. section 1292 (a) (1) a stay order is appealable only if the stay was sought to permit the prior determination of a related *equitable* matter, and whether a purpose such as is here present is sufficient. This important question of appealability, it is submitted, should be passed upon by this Court.

Such a decision by this Court will be of further importance to appellants in other courts throughout the federal judicial system which have had no decision from this Court as to whether it is necessary in order that a case be appealable that a prior determination of a related equitable matter be the purpose of the stay sought.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 1967